

Nos. 14,529, 14,530 and 14,531

IN THE

United States Court of Appeals
For the Ninth Circuit

MATANUSKA VALLEY LINES, INC.,
a corporation,

Appellant,

vs.

DOROTHY NEAL and NATHANIEL NEAL, JR.,
Appellees.

MATANUSKA VALLEY LINES, INC.,
a corporation,

Appellant,

vs.

BLANCHE THOMAS,
Appellee.

MATANUSKA VALLEY LINES, INC.,
a corporation,

Appellant,

vs.

WORDIE FRAZIER and PRINCE FRAZIER,
Appellees.

On Appeal from the District Court of the United States
for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

JURISDICTION.

The appellees accept generally the jurisdictional statement of the appellant, with particular reference

to the provisions of 28 U.S.C., Section 1291. The statement should be supplemented by reference to 28 U.S.C., Section 1294.

STATEMENT OF THE CASE.

(a) The Pleadings.

Appellees concur in the statement of the pleadings contained in appellant's brief under the heading "Pleadings and Facts" (Br. 1-2). But appellees point out that, the cases having been consolidated (R. 51), only one judgment was entered in the consolidated case (No. 14,529, R. 15).

(b) The Evidence.

Appellees Dorothy Neal, Wordie Frazier and Blanche Thomas were injured in an accident which occurred between 9:00 and 10:00 on November 20, 1951, when the appellant's bus in which they were fare paying passengers collided with a flat bed truck driven by Lois Williams on a curve in East "G" (Gambell Street) near Anchorage, Alaska (R. 92, 121, 111, 418).

Lois Olson, the employee of appellant driving the bus, was thoroughly familiar with the route and the road conditions: "I travel over the road enough to almost memorize the bumps" (R. 343).

The point where the accident occurred is on the level valley between two hills, at which point Gambell Street has descended from 15th Avenue, makes a sweeping "S" curve, and ascends to Fireweed Lane

(Pl. Ex. 1). The accident occurred at the bottom of the "S" (proceeding from 15th toward Fireweed). The bus was going North into town, and the truck was proceeding in the opposite direction toward the intersection of Fireweed Lane. From the top of one hill the entire valley, including the road and traffic on it, can be observed from the other. There was testimony that visibility, at the time of the accident, was good and was only temporarily and partially obscured by foliage around the curve itself (R. 364, 418).

Lois Williams, the driver of the truck, apparently pulled out of 17th Avenue onto Gambell Street and headed South on Gambell at about the time the bus commenced to descend the hill (R. 403, 415). The two vehicles met on the curve. The truck was coming toward the bus at a speed variously characterized as "a little too fast" (R. 111); "at a tremendous rate of speed" (R. 123) "at this tremendous speed" (R. 152); "coming fast" (R. 158); "at a pretty good rate of speed" (R. 344). Gambell Street, at the time was a gravel road full of "chuck holes" (R. 79), "a little bumpy and full of chuck holes and very slippery and rather icy" (R. 93), "icy and slippery" (R. 117), "terribly slippery" (R. 151), "bumpy" (R. 153), "in a rough condition" (R. 343), "rough" (R. 360), covered with a "light snow" (R. 435). There was a rough area with protruding rocks on the inside of the curve, that is the side of the road upon which the truck was proceeding (R. 461, 463, 465).

Lois Olson, the driver of the Matanuska bus, gave several versions of the collision. She placed the ap-

proaching truck, when first observed by her, at distances varying all the way from 50 to 70 feet (2 or 3 bus lengths) (R. 484), clear up to a city block and a half (500 feet) away (R. 423-424). At one point she stated that the truck was the *same* distance from the point of impact that she was when she first noticed it (R. 362), and then placed the truck *nearer* to the point of collision than was the bus (R. 376).

Appellant's driver knew that there were bumpy rocks and a rough condition in the path of the on-coming truck (R. 362). On direct examination she stated that at the speed the truck was coming, even if the truck driver had been completely sober, she could not have controlled the vehicle.

"Q. Will you state, if you know, just why it was that the truck did collide with the bus?

A. Well, on that curve the cars had been coming around it and before it had frozen, it had beat a sort of a ditch along there and left the hard rocks sticking up frozen into the ground and when her front wheels hit the hard rocks sticking up, it caused the wheels to bounce and therefore she lost control of the truck.

Q. It wasn't actually a skid?

A. No, it wasn't a skid. Her wheels were bouncing so it wasn't touching the ground enough for her to control the truck.

Q. If we assume that she was completely sober at the time, do you think she could have controlled the truck?

A. Not at that speed, she couldn't have. No.

Q. And the fact that you were so familiar with that section of the road was the reason that you were being fairly slow at that point?

A. That's right." (R. 345).

Lois Williams, the driver of the truck, agreed with Olson that the two vehicles were equidistant from the point of collision when she first observed the bus (R. 414-415). She was on her own side of the road until she hit the rocks on the inside of the curve and lost control of her vehicle (R. 409, 411).

After observing the approaching truck, Olson continued to proceed toward town and neither pulled off to the right, slowed her vehicle, sounded her horn, nor took any other action (R. 113, 124-6, 148, 158, 372, 415, 421).

The collision occurred and this suit followed.

(c) Verdict, Judgment and Appeal.

Verdicts in favor of the five appellees were returned on September 24, 1953, totalling \$101,500.00 (No. 14,529, R. 16) (No. 14,531, R. 14) (No. 14,530, R. 12). Judgment was entered in the consolidated case accordingly, on October 14, 1953, with interest at six percent per annum (No. 14,529, R. 16-19). After motions, and supplementary motions for new trial, or in the alternative to set aside the judgment, or to reduce the amounts of the verdicts had been denied (R. 51-57), appellant filed its notice of appeal in the consolidated case (R. 57).

SUMMARY OF ARGUMENT.

1. Although the evidence was conflicting, there was ample evidence to require submission of the case to the jury and to sustain the verdicts and judgment.
2. There was no error in the instructions, and the instructions as a whole, fully and fairly presented the issues to the jury.
 - (a) Instruction 14 was an accurate statement of the applicable speed limits.
 - (b) No confusion resulted from the giving of Instruction 18 relating to the present worth of future earnings.
3. The rulings of the court with regard to peremptory challenges were proper.

ARGUMENT.

1. **ALTHOUGH THE EVIDENCE WAS CONFLICTING, THERE WAS AMPLE EVIDENCE TO REQUIRE SUBMISSION OF THE CASE TO THE JURY AND TO SUSTAIN THE VERDICTS AND JUDGMENT.**

Appellant baldly states that there was no evidence of negligence on the part of Matanuska or its driver, and that the "facts are uncontroverted" (Br. p. 8).

Nothing could be farther from the truth. In fact, there were contradictions and disputed issues in the evidence on almost every fact issue in the case, and there was ample evidence of negligence on the part of Matanuska to justify the verdict of the jury and the judgment of the Court.

Take, for example, the testimony of the driver of the bus, Lois Olson:

(1) Her first version of the collision was given to an investigator on December 11, 1951, about three weeks after the date of the accident:

"I was almost at the base of the hill when I saw the truck coming toward me at a pretty good clip and was about to enter the curve. *The truck was two or three bus lengths away when I first saw it.* It was bouncing up and down on some rocks that were embedded in the roadway on the left hand side of the road from me. I pulled over to the right hand side of the road as fast as I could and as far over as I could. I stepped on the gas to try and get out of the way as the truck entered the curve and bounced over to the center of the road toward the bus." (Emphasis supplied) (R. 484).

This should be considered in connection with her admission in the same statement that "visibility was good" (R. 483), and other testimony that there was "nothing to obscure the vision", that one could see the road from one hill to the next (R. 364), and that the entire road is "practically 100 percent clear vision" (R. 452), more than 300 feet at any place (R. 452).

A "bus length" being 26 feet (R. 436), it is apparent that, on this version of the facts, the bus driver was negligent in not observing the speeding truck bouncing toward her on the rocky road until it was less than 70 feet away, when she could have seen its approach at 300 or more feet. A passenger

on the bus observed the truck at more than 100 feet (R. 111), and the truck driver saw the bus at about 150 feet (R. 418). Had the bus driver been maintaining a proper lookout for the approaching danger, appropriate steps could have been taken, such as pulling over on the shoulder, sounding her horn, or stopping her vehicle.

(2) At the trial, however, the Matanuska driver gave a different version (or versions) of the collision. According to her testimony as finally corrected, she first observed the approaching truck about *500 feet away* (one and one-half city blocks) (R. 423-4). Although it was speeding, it was holding to its side of the road and she had no reason to believe it would leave the curve (R. 344). She had just pulled around a pot hole in the right hand lane and was on the right hand edge of the road (R. 363). She was still in second gear, traveling only about 10 miles per hour, and three or four feet from the center line of the highway (R. 368-9). The truck suddenly bounced on the rocks, lurched across the road and struck the side of the bus (R. 347-8).

(3) Both of these stories of how the collision took place are controverted by other facts and testimony in evidence.

(a) The bus had not slowed down (R. 158), but had "picked up quite a bit of speed" (R. 177, 188). The bus was traveling 20 to 25, or 30 to 35, miles per hour (R. 95, 151). The driver once stated she was going from 15 to 20 miles per hour (R. 345), then at 10 miles per hour (R. 368), and then on cross ex-

amination so placed the two vehicles that she admitted *they must have been proceeding at the same speed* (R. 361-362). The truck was speeding by all witnesses (R. 111, 123, 152, 158, 344), although the truck driver only estimated her speed at 25 to 30 miles per hour (R. 403). These speeds might well be substantiated by the generally agreed fact that both the bus and the truck proceeded, out of control, about 100 feet, respectively, before coming to rest after the crash (R. 105, 112, 435, 436). The bus was a total loss, except for salvage parts, following the collision (R. 431).

(b) The point of impact occurred at or near the center line of the highway. Williams, the truck driver, put it "right on the line" (R. 421). Officer Boyd, by examining the debris in the road, placed the point of contact a little to the East (R. 94), but not more than one or two feet East of the center line (R. 459). On the other hand, Russell Swank, owner of the bus company, placed the point of collision at about six feet to the East of the center of the road (R. 332). The bus driver stated, as noted above, that she was "well over" or "way over" on the right hand side of the road in the loose gravel (R. 347, 363). The road at this point was "plenty wide, with three lanes of traffic" (R. 427), being 28 feet wide or wider from shoulder to shoulder (R. 76, 78, 106). The bus was eight feet wide (R. 436), and the truck was no more (R. 416).

(c) Both Charles E. Johnson, an uninjured passenger on the bus, and the driver of the truck, tes-

tified that the bus could have been pulled farther over to the right in order to avoid the collision (R. 134, 135, 136, 94, 415). Johnson said: "I would have pulled over as far as I could have to the side of the road which would probably be out in the gutter, but I know it would have been safe and as far as that vehicle was approaching." (R. 148). Lois Williams testified that there was about six feet on the other side of the bus before it would have reached the shoulder (R. 415). Again, Olson testified that she had just gone around a large pot hole in the road and was as far over on the right hand side of the road as she could get (R. 347, 363, 368). Officer Boyd testified that there was no large pot hole on the East (bus') side of the highway (R. 461). Passengers on the bus and the driver of the truck denied that the bus had swerved to the right or gone around a pot hole just prior to the collision (R. 113, 158, 415). As Lois Williams put it:

"Q. The bus, as a matter of fact, came right down on its own side of the road, close to the center line right up to the point of impact, did it not?

A. Yes, sir." (R. 415).

(d) In contrast to the testimony stated above that the visibility on the curve was good and that there was "nothing to obscure the vision" (R. 111), it should be noted that Lois Olson, the bus driver, testified that

"When you are coming down the hill and almost at the curve, the car coming along the level part

is obstructed by the brush that was there. It isn't there now * * *

Q. There your vision was limited to some degree by the brush at the side of the road. Is that correct?

A. Some degree, yes." (R. 364-365).

And the truck driver testified:

"Q. (by Mr. Kay). Mrs. Williams, did you hear the testimony of the bus driver, Mrs. Olson, that there was some brush on the curve which partially obstructed the view around the curve at that point?

A. Yes, I did.

Q. You also noticed that brush obscuring the view there, didn't you?

A. Yes, it was there, all right." (R. 418).

(e) Many witnesses testified that the road, on the day of the collision, was in an extremely icy and slippery condition. Officer Boyd characterized the roadway as "very slippery and rather icy" (R. 93). Johnson testified that the road was "icy and slippery" (R. 117). On the other hand, Russell Swank, owner of the bus line, testified that while the road was very rough, "It wasn't slippery. In computing the time of year and actually equivalent to other roads, it was in a normal condition. The weather was cold and it is not normally slippery when the temperatures are five or ten degrees below freezing." (R. 431).

(f) There was considerable conflict in the evidence as to the condition of the bus prior to the time of the collision. This vehicle was a 1938 model twin

coach, purchased second-hand from the Tacoma Transit Company, where the bus had been in storage for two years, about a year prior to the time of the accident (R. 430). Russell Swank testified that the bus had been completely renovated prior to the accident and indicated that the bus was in good operating condition. Lois Olson testified that the bus was in "very good condition" for proper operation (R. 346). On the other hand, Johnson testified that the busses were "very inadequate" and "nothing but crates" (R. 128). He further characterized the condition of the bus as "terrible" (R. 137), and stated that "hardly anything on that bus worked, speedometer or anything else worked" (R. 151). Admittedly, the speedometer was not working (R. 345). Officer Boyd estimated the damage to the bus at \$225.00 and stated that, in his opinion, "the bus was not worth much more than that to start with." (R. 475-6). The bus was not equipped with chains (R. 437).

Certainly it is apparent that, from this mass of conflicting testimony, the jury could have found facts establishing appellant's negligence. For example, and for example only, the jury might have concluded: that appellee passengers were being transported for hire by appellant in an antiquated bus in terrible condition; that the bus was being driven without chains at a speed in excess of the lawful limit and greater than was commensurate with safety, over an icy and slippery road; that the bus was met on a curve by a truck being driven at a high rate of speed; that, although the driver of the bus could have ob-

served the truck's approach for a great distance, she did not see it until the truck was within 50 to 70 feet; that the driver of the bus knew there was a rocky and bumpy road condition in the immediate path of the truck; that the bus driver *knew* that the driver of the truck might well lose control upon striking the rocks; that there was ample room on the right for the bus driver to pull over; that if the bus driver had pulled over to the edge of the road, there would have been no collision; that the bus driver neither swerved to the right nor applied her brakes—that, in fact, she did nothing.

Under such circumstances should this court disturb the verdict of the jury, or the judgment of the lower court? We think not.

"A verdict for plaintiff should not be set aside if it can be sustained from any viewpoint of approach." *Liquid Veneer Corporation v. Smuckler* (CCA 9th, 1937) 90 Fed. 2d 196, 205.

These appellees and the trial court are entitled to have the evidence, and the conflicts in it, considered in its most favorable light, and should receive the benefit of every legitimate and reasonable inference to be drawn from the evidence introduced. The question is not whether the evidence brings conviction to the minds of this court, but whether reasonable men could reach different conclusions upon it. *United States v. Meserve* (CCA 9th, 1930) 44 Fed. 2d 549; *United States v. Meakins* (CCA 9th, 1938) 96 Fed. 2d 751, 756; *United States v. Bemis* (CCA 9th, 1939) 107

Fed. 2d 894, 297; *Commercial Casualty Ins. Co. v. Stinson* (CCA 6th, 1940) 111 Fed. 2d 63.

Appellant's first argument addressed to the weight of the evidence places reliance upon the fact that the bus was at all times on the proper side of the road, and that the truck had crossed the center line to reach the point of impact (Br. 8-12). Conceding that, under normal conditions, a motorist has a right to assume that a vehicle approaching it in the opposite direction will obey the law of the road and will not suddenly cross the center line, such is not the invariable rule. And it is certainly not the rule where unusual circumstances such as the speed of the approaching vehicle, its erratic behaviour, the location, or conditions of the road, make such an assumption unwise. Much less is the driver entitled to blind reliance upon the law of the road when operating under the high duty of care imposed upon carriers of passengers for hire. *Cole v. Capital Transit Co.* (CA DC, 1952) 195 Fed. 2d 568.

In *Texas Bus Lines v. Whatley* (Tex. 1948) 210 SW 2d 626, the plaintiff bus passenger was injured in a head-on collision with another vehicle which had crossed the center line into the path of the bus. The bus driver made a gradual application of his brakes, but the collision occurred. The court pointed out:

“Rules as to right-of-way are invaluable as means of avoiding collisions, and had Ellison obeyed them the collision in question would not have happened. But the bus driver here was confronted with an imminent collision. He owed the

duty to his passengers to do what a very prudent and cautious person would do under the same or similar circumstances.” (630).

So, in the present case, the driver of the Matanuska bus, “law of the road” or not, had no right to imperil her passengers by proceeding blithely down the road near the center line, without pulling over or slowing down, when she saw the speeding truck approaching the rocky and dangerous point in the road. She had no right to speculate that the driver of the truck would probably be able to control it. See, *Nichols v. City of Phoenix* (Ariz. 1949) 202 Pac. 2d 201, where the court pointed out that the driver of a carrier is not relieved of the high duty of care owing his passengers merely because he carefully and conscientiously observes the law of the road in proceeding through an intersection, when he observed, or could have observed, another vehicle approaching from the side at high speed. Under such circumstances he cannot rely upon the duty of the other motorist to stop, and there is an issue of fact for the jury as to the negligence of the bus driver. Quoting from an Illinois case, the court said:

“The driver in charge of defendant’s bus could not negligently calculate on his ability to avoid danger to its passengers, nor so calculate and speculate as to the safety of the passengers in any respect.” (207).

To the same effect is *Longo v. Yellow Cab Co.* (DC ED Pa. 1948) 79 Fed. Supp. 478; *Cole v. Capital Transit Co., supra.*

Nor can appellant successfully contend that the "emergency" presented by the oncoming truck was so sudden as to preclude any corrective action on the part of the bus driver (Br. 12-14).

The high degree of care imposed upon a common carrier of passengers must be exercised in *foreseeing*, as well as in guarding against dangerous situations such as arise when another vehicle skids in front of the carrier. *Rozmajzl v. The Northland Greyhound Lines* (Ia. 1951) 49 NW 2d 501; see, *Horsley v. Robinson* (SC Utah, 1947) 186 Pac. 2d 592.

Or, as the court said in the *Cole* case, *supra*:

"The crucial question is not what the motorman did after he was faced with the emergency, of the Barnes car, but how he happened to become involved in that emergency. Were the circumstances such that he by proper care and foresight should have apprehended danger of a collision? If so, * * * it became the motorman's duty to do all that reasonably could have been done to avoid the impending danger." 195 Fed. 2d 568, 569.

To the same effect, see *Williams v. Capital Transit Co.* (CA DC 1954) 215 Fed. 2d 487; *Gillogly v. New England Trans. Co.* (R.I. 1948) 57 Atl. 2d 411.

So, here, the bus driver saw or could have seen, the truck approaching at a dangerous speed for more than 300 feet (R. 452, 364). She knew the rocky and rough condition in the path of the speeding truck (R. 362) and knew the driver might well lose control at that speed (R. 345).

The "emergency" which then arose was of appellant's own making.

Collision cases, such as the present one, between a public carrier and another vehicle coming into the lane of traffic occupied by the carrier, are unfortunately far from rare. Many of them present features such as dangerous road conditions, speed, and proper lookout quite similar to the case now before this court. In almost every such case the conflicting evidence requires, or makes proper, submission of the case to the jury for its decision, and indicates affirmance on appeal. See, for example, *Hennessey v. Burlington Transp. Co.* (DC Mont., 1950) 103 Fed. Supp. 660 (bus-truck head-on collision on icy road; speed, proper lookout); *Roy v. Mission Taxi Co., Inc.* (Cal. 1951) 225 Pac. 2d 920 (taxi-truck; speed, center of road, lookout); *Price v. Greenway* (CA 3rd, 1948) 167 Fed. 2d 196 (bus-parked truck; speed, lookout); *Atlantic Greyhound Corporation v. Lauritzen* (CA 6th, 1950) 182 Fed. 2d 540 (bus-passenger car; speed, distance, lookout); *Curlee v. Morris* (Ariz. 1951) 231 Pac. 2d 752 (taxi-passenger car head-on collision; speed, center of road, emergency action); *Gillogly v. New England Transp. Co.* *supra* (bus-passenger car head-on collision; speed, control).

It should be noted that the courts in such cases are not concerned with the *degree* of negligence exhibited by the carrier. The evidence may demonstrate gross negligence on the part of the other vehicle, and only "thin" or slight negligence on the part of the carrier. But, as pointed out in *Red Top Cab and*

Baggage Co. v. Masilotti (CA 5th, 1951) 190 Fed. 2d 668:

“The appellants could not escape liability by proof that the negligence of the taxi cab driver, if any, was of small degree when compared to that of the driver of the other automobile involved in the collision. Plaintiff’s actions proceeded against both drivers as joint tort feasors whose negligence combined and concurred to cause the collision. Consequently if the collision resulted from the concurring negligence, either party is liable to the plaintiff to the same extent as though the injuries had been caused by his negligence alone.” (At 670-671).

See, also, *Curlee v. Morris, supra.*

The following surprising statement appears at page 15 of Appellant’s brief: “The *res ipsa loquitur* doctrine does not apply to collision cases.”

The statement is “surprising” because of its inaccuracy. In fact, where plaintiff is a fare-paying passenger on a carrier involved in a collision (as in the present case) the doctrine of *res ipsa loquitur* is available, at least to create a *prima facie* case or presumption of negligence on the part of the carrier. Although the courts differ as to scope of the doctrine in such cases, such is the rule in apparently a majority of the jurisdictions which have faced the question. Annotations on the specific subject are found in 25 ALR 690; 83 ALR 1163; 161 ALR 1113.

Obviously the application of the rule is proper. Why should the passenger be required to keep a look-

out for danger and be able to explain the cause of an accident? *Loudoun v. Eighth Ave. R. Co.* (NY 1900) 56 N.E. 988. In the present case, two of appellees, Mrs. Frazier and Mrs. Neal, knew nothing about what happened; they were chatting, as they had every right to do, when the collision occurred (R. 177, 197).

For good cases on the application of the doctrine under like circumstances from other courts and jurisdictions, see: *Kansas City F. S. & M. R. Co. v. Stoner* (CCA 8th, 1892) 49 Fed. 209; *Capitol Transit Co. v. Jackson* (CCA DC 1945) 149 Fed. 2d 839; *Williams v. Capital Transit Co. supra*; *Laphew v. Consolidated Bus Lines, Inc.* (W. Va., 1949) 55 S.E. 2d 881; *Plumb v. Richmond Light & R. Co.* (N. Y. 1922) 135 N.E. 504; *Christensen v. Surface Transp. Corp. of New York* (N. Y. 1954) 128 N.Y.S. 2d 146; *Stark v. Yellow Cab Co.* (Cal. 1949) 202 Pac. 2d 802; *Deshotel v. Atchison T. & S. F. Ry. Co.* (Cal., 1954) 272 Pac. 2d 71; *Whitney v. Northwest Greyhound Lines, Inc.* (Mont. 1952) 242 Pac. 2d 257, 262; *Rothweiler v. St. Louis Public Service Co.* (Mo. 1950) 234 S.W. 2d 552.

In any event, we submit that there was more than sufficient evidence of negligence on the part of appellant, without reliance on the doctrine of *res ipsa loquitur*, to go to the jury, and we so treated the subject in our argument to the court (R. 304-313).

2. THERE WAS NO ERROR IN THE INSTRUCTIONS, AND THE INSTRUCTIONS AS A WHOLE, FULLY AND FAIRLY PRESENTED THE ISSUES TO THE JURY.

(a) Instruction 14 Was an Accurate Statement of the Applicable Speed Limits.

The portion of Instruction No. 14 quoted in appellant's brief (Br. 16) is only a part of the instruction, containing a part of the applicable law. We have set forth the entire instruction and the entire law and speed regulation (having the effect of law) in the appendix to this brief. We believe the instruction, although concise, gave the jury all the information with regard to the speed limit at the point of the accident which was required by the evidence.

Summarized, the law concerning the speed limit was as follows: (1) generally, no greater than "reasonable or prudent" under conditions existing at the time and place; (2) if the view on the curve was obscured within 100 feet, fifteen miles per hour; (3) if posted for a speed limit, the posted speed; (4) if unobscured and unposted, then 50 miles per hour, shall be deemed "reasonable or prudent" in each instance.

There was evidence that the view on the curve was both obscured and unobscured. Olson and Williams both testified that foliage obscured the vision to some extent at that time (R. 364, 418). Johnson and Swank, on the other hand, indicated that there was nothing to obscure the visibility (R. 111, 450-3). There was also some testimony that the posted limit at the time was 35 miles per hour (R. 448). As we have noted above, witnesses placed the speed of the

bus at everywhere from 10 m.p.h. to as fast as the truck; *supra*.

It was for the jury to resolve these apparent conflicts, and all that this instruction did was supply them with the law applicable to whatever set of facts they might find. The instruction was purely definitive, and any portions of it which did not fit the facts found by the jury would be disregarded by them and may be considered harmless surplusage.

Counsel for appellees did not "blow hot and cold simultaneously" on this question (Br. 17). Counsel argued that the view was unobstructed at a time when there was *no evidence to the contrary* (R. 305); when contradictory evidence was introduced he altered his argument accordingly.

**(b) No Confusion Resulted From the Giving of Instruction 18
Relating to the Present Worth of Future Earnings.**

Again, in discussing Instruction No. 18, appellant's counsel has brought only a portion of the instruction before the court (Br. 18). The entire instruction will be found in the Appendix of this brief and in the record at page 519.

This instruction was intended to give the jury a method of computing damage for permanent loss of earnings, if any, on the part of appellee Dorothy Neal. Mrs. Neal had testified that she had been earning an average of \$50.00 per week (R. 195), and an insurance underwriter had testified that her life expectancy at age 24 was then 42 years (R. 269). The portion of the instruction which appellant argues is

so technical and confusing as to be objectionable relates to the simple formula which the court included in the instruction as a yardstick which the jury might use in determining the present worth of her future earnings. The court apparently took this formula from the opinion of this court in *Aetna Life Insurance Co. v. Geher* (CCA 9th, 1931) 50 Fed. 2d 657, at 660, where the formula, in computing the present worth of \$2,000.00 payable in 17, 18 and 19 years, was expressed as:

$$\$2000 \div (17 \times 7\% + 1) = \$913.24 \text{ present worth}$$

$$\$2000 \div (18 \times 7\% + 1) = \$884.96 \text{ present worth}$$

$$\$2000 \div (19 \times 7\% + 1) = \$858.37 \text{ present worth}$$

All of the actual elements entering into the formula, such as life expectancy, amount of future earnings, and rate of return were carefully left to the determination of the jury by the complete instruction, and all other elements of damage were covered by another instruction (R. 518).

We certainly agree that the purpose of an instruction should be to inform and assist, not to confuse the jury. We submit that it would have been difficult for the trial court to have devised a more pointed and explicit instruction on this subject. We see nothing "confusing" or giving rise to "confusion" in this formula as contained in Instruction No. 18, nor as contained in the opinion in the *Aetna Life* case, *supra*.

In any event, there has been no showing that the jury was in any way confused or that they failed to follow the instruction of the court, and indeed appellant has made no attempt to make such a showing.

This court has held that the appellant is entitled to no relief in such circumstances. *Harper & Reynolds Co. v. Wilgus* (CCA 9th, 1893) 56 Fed. 587; *Husky Refining Co. v. Barnes* (CCA 9th, 1941) 119 Fed. 2d 715, 717.

The trial court gave a thorough and complete charge to the jury, fully covering all of the law involved in the proceeding. Appellant has argued fault in only two out of the 38 separate instructions. Considered as a whole, the instructions fairly and substantially presented the issues to be decided, and the judgment should not be disturbed on appeal. *Goodyear Fabric Corporation v. Hirss* (CCA 1st, 1948) 169 Fed. 2d 115; *Rowe v. Dixon* (Wash., 1948) 196 Pac. 2d 327.

3. THE RULINGS OF THE COURT WITH REGARD TO PEREMPTORY CHALLENGES WERE PROPER.

Appellant contends that the trial court committed error in denying appellant more than three peremptory challenges, "although there were three cases being tried by the court" (Br. 20).

(a) Perhaps the most obvious and accurate answer to this contention is the fact that the court did *not* deny additional peremptory challenges to the appellant at any time. In fact, the court explicitly offered such additional challenges as they might require upon a showing of cause out of the presence of the jury. This offer was declined. The record at this point discloses the following:

"Mr. Cottis. If the Court please, before examining the alternate jurors, the defendants ask that they have another peremptory challenge.

The Court. Well, you will have to show good cause for it.

Mr. Cottis. The defendants believe that as a matter of right they are entitled to more peremptory challenges.

The Court. Well, what has been the practice in this court?

Mr. Cottis. As far as I recall, Your Honor, this is the first *consolidated case* I have ever been in (emphasis supplied).

The Court. I have never heard of the practice being other than what the court has declared in this case but you may be entitled to an additional peremptory challenge but only upon showing good cause for it. Now, of course, obviously that cause does not have to be announced in court but it has to be told to the court in private or that is, at least at the bench where the other attorneys are present.

Mr. Cottis. Well, we do not ask for a peremptory on the basis of any particular cause, Your Honor, but we demand an additional peremptory challenge as a matter of right" (R. 70-71).

From the entire colloquy, including the final invitation by the court and the final response of counsel, it is obvious that appellant was far less desirous of actually employing an additional challenge than it was of creating an additional point for consideration by this court. The trial court recognized this fact in his opinion (R. 55-6).

(b) While formal exceptions to rulings or orders of the court are unnecessary under Rule 46, F.R.C.P., it is still necessary that the objecting party make known to the court “* * * his objection to the action of the court and his grounds therefor; * * *” Rule 46, F.R.C.P. Out of fairness to the trial court, the objection should be sufficiently specific to focus attention on the error, if any, so as to permit correction.

We submit that the mere statement by counsel that he demanded more challenges “as a matter of right” was not a sufficient compliance with Rule 46. It was in the nature of a general objection, unavailable for review on appeal. Had he stated a basis for the alleged “right,” such as “The defendants feel there are 3 cases being tried here and we should have challenges in each of them,” or, “there are two defendants here, Your Honor, and their defenses are antagonistic,” then some specific question would have been before the Court.

“It is not permissible to so frame an objection that it will serve to save an exception for the action of a court of review and yet conceal the real complaint from the trial court.” *Maulding v. Louisville & N. R. Co.* (CCA 7th, 1948) 168 Fed. 2d 880, 882.

See, also, *Barron & Holtzoff*, Federal Practice and Procedure, Vol. 2, Sec. 1021, Notes 5 and 6 and cases cited.

(c) We agree with the appellant that the number of peremptory challenges to which defendant was en-

titled is governed by Sections 55-7-41 and 55-7-50, A.C.L.A. 1949, rather than by the Federal statute (28 U.S.C., Sec. 1870). This is, in fact, one basis for distinguishing all of the cases cited by appellant's brief under the heading "Rule of Hillmon Case," as all of these cases involved the application of 28 U.S.C., Sec. 1870 (Br. 22-23).

On the other hand, courts construing the provisions of statutes similar or identical to the Alaska law have held that, regardless of the number of parties on one side of the case, all must join in the permitted peremptory challenges. *Colfax Nat. Bank v. Davis Implement Co.* (Wash., 1908) 96 Pac. 823; *Crandall v. Puget Sound Traction L. & P. Co.* (Wash. 1913) 137 Pac. 319; *Switzer v. Atchison T. & S. F. R. Co.* (Cal., 1930) 285 Pac. 918.

(d) Rule 42(a) F.R.C.P. clearly contemplates three distinct courses which a court may follow when separately filed cases involve common questions of law or fact: (1) it may order a joint hearing or trial; (2) it may order all the actions consolidated; (3) it may make orders effecting savings in costs. In the instant case there was never any discussion of a "joint hearing or trial"; after the order of consolidation the consolidated "case" was thereafter referred to in the singular.

The test of whether these original actions were consolidated, we contend, is whether they *could* have been joined. Of this there can be no question. Rule 20(a) F.R.C.P. provides that all persons may join in one action as plaintiffs if they assert any right to relief,

jointly or severally, arising out of the same occurrence, giving rise to any common question of law or fact. This rule fits like a glove. Clearly all appellees could have joined in the same suit had they cared to do so. See, *Thompson v. United Glazing Co.* (D.C., W.D. N.Y., 1941) 36 Fed. Supp. 527.

The defendant cited numerous cases involving the failure to grant sufficient peremptory challenges in cases jointly tried, sometimes loosely referred to as consolidated for trial. We contend that these cases are clearly distinguishable. *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 188 U.S. 208, was a case in which cases were merely joined for trial. The cases could not have been consolidated under the rules as they then existed.

Other cases cited by appellant are equally distinguishable. The *Signal Mountain Portland Cement Company v. Brown* (CCA 6th, 1944) 141 Fed. 2d 471 case, and the case of *Davis v. Jessup* (CCA 6th, 1924) 2 Fed. 2d 433 are examples of separate cases tried together; they *were not* consolidated in any sense of the word. In *National Nut Co. v. Susu Nut Co.* (D.C., N.D., Ill. 1945) 61 Fed. Supp. 86, the cases tried jointly could not have been joined originally under Rule 20(a).

Certainly it would not seem to be the purpose of the Rules to increase the number of challenges permitted merely because the parties bring separate cases which are then consolidated, rather than initially joining in one original suit.

As the trial court said in the instant case:

"Thus it would appear that Section 55-7-50 governs, so far as peremptory challenges are concerned, where the actions are joined originally or, being such as could have been joined, are subsequently consolidated. It is clear, therefore, that if the actions here consolidated could have been joined under Rule 20(a) their subsequent consolidation under Rule 42(a) could in no wise enlarge the number of challenges under Section 55-7-50. It follows, therefore, that, since causes may be consolidated under Rule 42(a) (because of its broader language), that could not be joined initially under Rule 20(a), the parties are entitled to additional challenges only when the causes consolidated are of the latter class" (R. 53).

CONCLUSION.

In summarizing this case, appellees submit:

1. The court did not deny appellant peremptory challenges to which it was entitled in this consolidated case; the objection made to the court's action in this regard was insufficient to require review.
2. The instructions of the court were neither confusing nor erroneous; they were precise and proper statements of applicable legal principles.
3. There was ample and substantial evidence from which a jury of reasonable men could, and did, determine that appellant had failed in the high duty of care which it assumed in carrying passengers for hire; appellant was negligent.

We submit that the verdicts of the jury and the judgment of the lower court should not be disturbed. The judgment should be affirmed.

Dated, Anchorage, Alaska,

June 28, 1955.

Respectfully submitted,

WENDELL P. KAY,

STRINGER & CONNOLLY,

Attorneys for Appellees.

(Appendix Follows.)

Appendix.

Appendix

COURT'S INSTRUCTIONS TO THE JURY.

No. 14.

Reckless driving is defined as follows:

“Any person who drives any automobile, motorcycle or other motor vehicle upon any public street or highway in this Territory, carelessly, heedlessly, or in wilful or wanton disregard of the rights or safety of others or without due caution and circumspection, or at a speed or in any manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving.”

It is further provided that:

“No person shall drive any motor vehicle upon any highway at a greater speed than is reasonable or prudent having due regard for the surface and the width of the highway and the traffic thereon, and in no event at a speed which endangers the safety of persons or property.”

and that the speed limit is 15 miles per hour

“When approaching any curve or any other part of the highway where the driver's view is obstructed within one hundred feet ahead.”

If you find that within 100 feet of the curve at which the collision occurred, the view of the bus driver or the truck driver was obstructed, the speed limit as to such driver would be 15 miles per hour. But if you find that it was not so obstructed, the governing speed limit at that time would be 35 miles per

hour, if you find it was posted for such speed; otherwise, the speed limit would be 50 miles per hour.

No. 18.

You are instructed that, in arriving at your verdict as to the amount of damages for permanent injuries, if any, resulting in a permanent loss of earnings by the plaintiff, if any, you may consider the mortality tables referred in evidence as tending to prove the life expectancy of the plaintiff, Dorothy Neal. Such tables are not binding, however, and you may determine such life expectancy from your own observations of the plaintiff, and such other assistance as you may obtain from the evidence, and all the facts and circumstances in evidence, including such tables. You have a right to consider the probabilities of accident, sickness, or other happenings reasonably likely to terminate the results of plaintiff's injuries.

In making an award for permanent loss of earning power, if any, the present worth of such award must be determined. The present worth of a sum of money payable in the future is such a sum as would, if put at simple interest, at the rate of return that a reasonable and prudent person would expect in making investments, amount to what the plaintiff, Dorothy Neal, could reasonably expect to earn during her life. To illustrate: the present worth of \$10,000 payable 20 years from today is determined by using the following formula:

$$\frac{\$10,000}{1 \text{ plus } 20 \text{ times } .04} = \frac{\$10,000}{1.8} = \$5,555.55$$

assuming that 4% interest would be the rate of return that a reasonable and prudent man would expect to obtain in making investments. It is for you to decide what that rate of return, or interest, would be, considering all the circumstances. Similarly the present worth of \$1000 to be paid over a period of 10 years, with an assumed safe investment rate of 5% is calculated by dividing \$1000 by the sum of one plus the number of years of life expectancy, times the investment rate or:

$$\frac{1000}{1 \text{ plus } (10 \text{ times } .05)} = \frac{1000}{1 \text{ plus } .05} = \frac{1000}{1.5} = \$666.66$$

After you have determined what the plaintiff, Dorothy Neal would earn during her life, you should determine the present value thereof according to the foregoing formula, and award her that sum, if you find her entitled to recover for loss of earning power.

SEC. 50-1-4 ALASKA COMPILED LAWS ANNOTATED 1949.***Powers and duties of Board of Road Commissioners.***

* * *

(f) *Rules and regulations governing use of roads and highways.* To promulgate rules and regulations governing the use of the roads and highways as to—

(1) speed limits on straight-of-ways, curves and otherwise;

- (2) approaching vehicles;
- (3) overtaking vehicles;
- (4) sounding of horn;
- (5) prohibiting passing on curves;
- (6) prohibiting following too closely;
- (7) making turns to the right or the left;
- (8) signals on starting, stopping and turning;
- (9) right-of-way between vehicles including arterial highways as well as other roads;
- (10) parking, and
- (11) such other phases of traffic control as the Board deem necessary or advisable.

* * *

(h) *Publication and distribution of rules and regulations: Agreements with Federal agencies.* To publish, in pamphlet form, the rules and regulations promulgated and distribute the same free of charge to the traveling public through such appropriate officers or agencies as it shall designate for the purpose; Provided, that as to the promulgation and enforcement of all of its standards, rules and regulations the Board is empowered to enter into agreement with, and otherwise cooperate with all of the Federal agencies referred to in * * * Compiled Laws of Alaska, 1949, Section 41-2-2 and fire patrol system of the Department of Interior.

* * *

REGULATIONS ON TRAFFIC CONCERNING SPEED.

SPEED LIMITS

No person shall drive any motor vehicle upon any highway at a greater speed than is reasonable or prudent having due regard for the surface and the width of the highway and the traffic thereon, and in no event at a speed which endangers the safety of persons or property.

The following limitations under various conditions shall be deemed as reasonable and prudent:

(a) Fifteen Miles per Hour.

1. When passing an approaching vehicle upon any road having a width of less than eighteen feet between shoulders.
2. When crossing a bridge or highway intersection if during the last one hundred feet of the approach to such crossing the driver does not have a clear and unobstructed view of at least four hundred feet ahead.
3. When approaching any curve or any other part of the highway where the driver's view is obstructed within one hundred feet ahead.
4. When passing a school building during school hours or when children are going to or leaving school.

(b) Twenty-Five Miles per Hour.

1. On any part of any road having a width of less than sixteen feet between shoulders.

2. On any section of any road where there are numerous curves and where the driver's view is obstructed within a distance of three hundred feet ahead.
3. Except as provided in (a) 2 above when crossing any highway bridge having a greater length than fifty feet.
4. For any freight carrying vehicle having a gross weight of more than twelve thousand pounds.

(c) Fifty Miles per Hour.

1. Unless posted for less 50 miles per hour shall be deemed reasonable and prudent on any section of any highway not affected by such limitations as width and surface conditions of the roadway, curves, grade crossings and bridges or other considerations making speed restrictions necessary and shall constitute the maximum speed for any road or highway in the Territory.
2. No driver shall drive at a speed faster than that at which the vehicle can be stopped within the distance of the clear road visible ahead. Provided, however, that the Board may, in its discretion, designate highways or sections of highways where further speed limitations may be imposed.